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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RYAN BERRY-VIERWINDEN, Defendant and Appellant.	D059670 (Super. Ct. No. RIF121073)

APPEAL from a judgment of the Superior Court of Riverside County, Helios J. Hernandez, Judge. Affirmed.

Ryan Berry-Vierwinden appeals from a judgment convicting him of first degree, lying-in-wait murder under an aider and abettor theory. He raises numerous contentions of error. He argues the court erred by: (1) instructing on aiding and abetting with improper "equally guilty" language and with an irrelevant reference to the natural and probable consequences doctrine, and (2) modifying the standard instructions on murder and lying in wait to accommodate the aiding and abetting theory. He contends there is insufficient evidence to support the jury's finding that he aided and abetted the murder.

He raises claims of instructional error because the jury was not instructed on voluntary intoxication, involuntary manslaughter, duress, and accessory after the fact. He asserts his counsel's representation was deficient because his counsel failed to adequately respond to evidence of scratches on defendant's face, and failed to request admission of an unavailable witness's preliminary hearing testimony. He contends the prosecutor committed misconduct during closing arguments by referring to facts outside the evidence. He argues the trial court committed errors related to claims of juror misconduct. Finally, he asserts the cumulative effect of error requires reversal.

We reject defendant's contentions of reversible error, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 14, 2004, Krishana French's burned body was found by a worker in an orange grove. The police investigation revealed that she had been murdered at a hotel room in the early morning hours of December 3, and her body was thereafter dumped and burned at the orange grove. Defendant was charged with the murder on the theory that he aided and abetted the actual perpetrator (Benjamin Medina), and that the murder was of the first degree because it was committed by means of lying in wait.[1] The sole theory presented to the jury was that defendant knew about and intended to assist Medina with the target offense of murder; there was no contention that defendant was culpable under the natural and probable consequences doctrine based on his intent to facilitate an offense other than murder.

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1 Defendant was tried separately from Medina.

At the time of the murder, victim French and several of her friends and acquaintances (including defendant and Medina) were staying at a Comfort Inn hotel. The group "hung out" together, went to casinos, partied, and used methamphetamine. On the night of the murder, French was staying with her boyfriend (Hector Gonzalez) in a hotel room on the first floor, while Medina, defendant, and several others (Desirae Flores, Erika Arreola, and Jeremy Allen) were staying in a room directly above them on the second floor. Defendant and Medina were alone with Flores in her hotel room at the time of the killing. Two of the people staying in the same hotel room as defendant (Flores and Allen) made statements to the police and testified about events before and after the crime. Also, after the police had commenced its investigation and identified the persons (including defendant) present at the hotel on the night of the murder, defendant retained an attorney and contacted the police. He thereafter provided statements to the police which set forth his version of the events.

At trial, prosecution witnesses testified that Medina was a gang member known as "Rebel" and known to carry a gun. The victim's boyfriend (Gonzalez) was in charge of a stolen Lincoln Navigator vehicle in which Gonzalez had stored two handguns. While the group was at the Comfort Inn, French asked defendant to give her a ride to the Navigator. After consulting with Gonzalez on the phone, defendant told French that she could not use the Navigator.[2] French said she was going to get the vehicle anyway, and left the hotel.

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2 Gonzalez was not at the Comfort Inn at this time nor during the ensuing events.

Around 3:00 a.m. on December 3, French returned to the Comfort Inn in the Navigator and went to her room. According to Flores, Medina was upset that Flores had gotten the Navigator and said it was "disrespectful," and the others concurred with this. Medina and defendant talked about defendant going to French's room to get the Navigator keys from French. French liked defendant, so Medina thought that French would hand over the keys more easily to defendant. Flores testified that the plan was that if defendant was unable to get the keys from French, he was supposed to "chirp" Medina on his two-way radio. Flores stated the group did not discuss hurting French, and defendant only agreed to go get the keys.

Allen also testified that defendant and Medina discussed getting the Navigator keys from French. Allen heard Medina say that "he was going to take care of [French] and get the car keys back." According to Allen, the plan was for defendant to go to French's room and then "chirp [Medina] to let him in" so that Medina could get the keys and take the Navigator. Defendant was to go to French's room because he "was friends with [French]." When asked on cross-examination whether the conversation was that defendant was only to go and take the Navigator keys, Allen testified, "No. He was going down there to let [Medina] in the room."

Defendant left to go to French's room. About five or 10 minutes later, Medina received a "chirp" and he went to French's room. Allen testified that he was not concerned for French's safety when Medina went to her room and he did not think anything was going to happen.

While defendant and Medina were gone, Flores and Arreola went outside to retrieve an item that Arreola had left in the Navigator. When the two women were in the hallway returning to their room, they heard a "faint scream" coming from the area of French's room. The two women stopped by French's room and listened, but it was quiet and they returned to their hotel room. Allen, who was still in their room, had heard "one loud scream" and thought it was French.

A few minutes later, Medina (without defendant) returned to their room. Medina appeared anxious and scared, and he had blood on his hands. He said that "it was done" and he "did her." He stated that he had an argument with French; he hit her with a gun; there was "white stuff" coming out of her head; and then he got on top of her and strangled her. Medina said that he was going to go get cleaned up at the home of his " 'baby mama[ ]' " (Jessica Herrera). Medina gave Flores a gun and said he would call her.[3] Flores put the gun in her purse. After Medina left, Allen packed up his belongings and left the hotel, whereas the two women waited in the hotel room for Medina to contact them.

Later, Medina called Flores and told her that she and Arreola should pack up their belongings, meet in the parking lot, and leave the hotel. Defendant, Medina, and the two women went in several vehicles to an apartment complex, where Flores told the women they could leave and that he and defendant "were going to go handle their business."

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[3] Flores and Medina were dating.

Medina's ex-girlfriend (Herrera) testified that in the early morning hours of December 3, Medina came to her home to change clothes. Shortly thereafter, defendant also arrived at her residence and changed his clothes. Defendant looked "scared" and "[d]isoriented." Herrera noticed about four scratches underneath defendant's eyes. It looked to her as if someone "had nails" and the person "grabbed his face and scratched him."

Later that same night, Medina called Flores. During the phone call, Flores could hear defendant in the background playing dice with Medina and laughing. At Medina's direction, Flores and Arreola then met with Medina and defendant at a motel, where Flores returned the gun to Medina. The group discussed what they would tell French's boyfriend about the events at the Comfort Inn.

Around December 7 or 8, Medina called Flores and told her to drive and meet him at some orange groves. Flores went with Arreola to the orange groves, where she tried to help Medina and defendant get a stuck vehicle out of the mud. While they were at the orange groves, defendant approached Flores and told her that she "better keep [her] mouth shut" and they "didn't want another accident." On another occasion Flores heard Medina say that "he hit [French] in the head and that her head swelled and he left it to [defendant]."

Flores testified that when she saw defendant and Medina together at the Comfort Inn and the orange grove, they appeared "to be working together"; she never heard Medina threaten defendant; and defendant never indicated to her that he was afraid of Medina.

French's body was burned beyond recognition, and she was eventually identified after her mother contacted the police and provided her dental records. The autopsy results showed that French had sustained blunt force injuries to her head and lower back from what could have been a beating, but it was unlikely that these were fatal. The charring of her body from the burning prevented a precise determination of cause of death, but there was nothing that ruled out death by strangulation.[4]

Defendant's Statements to the Police

On December 28, 2004, an attorney retained by defendant contacted the police, and defendant spoke with the police during interviews on December 29, 2004, and January 5, 2005.[5] Defendant told the police that after French left to take the Navigator, they talked about French's disrespect, and Medina told defendant that he wanted to "just do her or blast her," which meant to kill her. When French returned to the hotel, she called and asked defendant to go to her room. Defendant went, and when French was in the bathroom, he retrieved the Navigator keys from the nightstand.

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[4] The autopsy showed that while she was still alive she had suffered nonfatal hemorrhaging consistent with blunt force trauma to her lower back and to four separate sites on her head. Further, there were indications of postmortem sharp force injuries to her back side chest cavity area. The burning was also postmortem. Because of the charring of her body, the forensic pathologist was unable to determine whether there were signs of strangulation; however, he testified she could have died from strangulation.

[5] At this point in the police investigation, French had been identified as the victim and the police knew that French, defendant, and the others had been at the Comfort Inn.

About 15 minutes later, Medina opened the door and entered French's room, locking the door behind him.[6] At first Medina and French had a friendly conversation, but they then got into an argument about French's disrespect. The argument escalated, and Medina hit French on her head with a handgun, causing French to fall on the bed. Medina sat on French's stomach and strangled her with his hands for about three minutes. Medina then took a tie from the hood of French's sweatshirt and tied it around her neck.

Once French was dead, Medina told defendant to "clean up the mess." Medina gave defendant some garbage bags that he had concealed under his sweatshirt, and he told defendant to put French's body into the bags. After Medina left the room, defendant wrapped the body in the bags and placed the bloody sheets in the bags. When Medina returned to the hotel, defendant and Medina left with the body and the sheets. They disposed of the sheets in a dumpster at an apartment complex, and left French's body in the orange groves. They then met up with Flores and Arreola and went to a motel to "chill for a while." Several days later, Medina had the idea to return to the orange groves to burn French's body. Defendant accompanied Medina to the orange groves, where Medina poured gas on French's body and lit it on fire. About one or two days later, defendant went with Medina to a casino.

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[6] Defendant told the police that the door to French's hotel room was not locked because the swivel latch was preventing the door from closing all the way; thus, he (and presumably Medina) were able to open the door and enter the room. Defendant stated that when he arrived at the room he let the door close and did not do anything to the latch, but he did not purposely leave the door open for Medina.

Initially, defendant told the police that Medina's arrival at the room was unexpected, but later he admitted that he and Medina had a plan. Defendant stated that when French returned to the hotel, he and Medina "made a plan for [defendant] to go downstairs and [Medina] would follow shortly thereafter." Defendant was supposed to "[k]eep [French] busy" and keep her inside the room until Medina arrived to "tune her up or hit her or something." Defendant told the police that he had "brushed" off Medina's earlier statement that he wanted to kill French as "small talk" because Medina said it in front of others. When Medina told defendant to go to French's room, Medina did not say he was going to kill French. When Medina arrived at French's room, defendant did not think Medina was going to kill French.

Defendant stated that when Medina hit French, defendant was in shock because he had "just seen someone pistol-whip someone with a gun" and he had never been "in a situation like that." During the strangulation, defendant started "creeping toward the door" to leave the room. However, Medina grabbed his gun, waved it toward defendant, and told defendant to stay in the room and if he said anything "he'd be next along with his family."

While defendant was cleaning up the room, he was afraid that if he said anything he was going "to be the next one," and he was also afraid that he was going to get into trouble for something he did not do. Defendant told the police that he was frightened of

Medina.[7] He acknowledged that after the murder there were no further threats from Medina.

Jury Verdict and Sentence

The prosecution's theory of the case was that defendant and Medina formulated and put into action a plan to murder French by means of lying in wait.[8] The defense did not dispute that Medina committed lying-in-wait murder. However, the defense maintained that the only plan between defendant and Medina was for defendant to get the Navigator keys from French, and that Medina (who was a violent, "shot-caller" gang member), on his own and unbeknownst to anyone else, decided to kill French.

The jury convicted defendant of first degree murder by lying in wait. He was sentenced to 25 years to life in prison.

DISCUSSION

I. *Relevant Legal Principles*

To assist our review of defendant's claims of error, we first summarize relevant homicide and aiding and abetting principles.

Murder is an unlawful killing committed with malice aforethought. (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) Malice may be express or implied; it is express when the defendant intends to kill, and it is implied when the defendant deliberately

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7 Cooperating with the police, defendant called Medina and arranged to have him come to a hotel where he was arrested by the police.

8 The jury was not instructed on any offenses lesser than murder.

commits an act that is dangerous to human life and acts with knowledge of the danger and a conscious disregard for life. (*Ibid*.)

Once the jury has found the defendant committed murder (i.e., a killing with express or implied malice), it must then determine if the murder was of the first or second degree. First degree murder includes murders committed by lying in wait. (*People v. Stanley* (1995) 10 Cal.4th 764, 794.) A lying-in-wait murder occurs when the defendant conceals his or her purpose, engages in a substantial period of watching and waiting for an opportune time to act, and inflicts a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Gurule* (2002) 28 Cal.4th 557, 630.)

First degree, lying-in-wait murder does not require intent to kill; rather, the offense only requires the conscious disregard for life associated with implied malice. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2; *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 309; *People v. Laws* (1993) 12 Cal.App.4th 786, 793-794.)[9] Murder by lying in wait is regarded as a particularly heinous crime; thus, it is deemed to be murder of the first degree even absent

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9 Unlike lying-in-wait murder, the lying-in-wait special circumstance does require intent to kill. (See *People v. Edelbacher, supra*, 47 Cal.3d at p. 1023; *People v. Superior Court (Bradway), supra*, 105 Cal.App.4th at p. 309.)

specific intent to kill. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 795, *People v. Laws*, *supra*, 12 Cal.App.4th at pp. 793-794.)[10]

A defendant may be culpable for a crime as a direct perpetrator or as an aider and abettor. To be culpable as an aider and abettor, the defendant must have acted with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) The aider and abettor is liable for (1) the offense committed by the perpetrator that was intended by the aider and abettor (the target offense), and (2) other offenses committed by the perpetrator that were not intended by the aider and abettor but that were the natural and probable consequence of the intended offense. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117; *People v. Prettyman* (1996) 14 Cal.4th 248, 260-261.)

With respect to the target offense intended by the aider and abettor, the aider and abettor's mens rea is the intent associated with the target offense. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118 & fn. 1.) In some circumstances the aider and abettor may be found guilty of a target offense that is greater or lesser than the offense attributed to the perpetrator, depending on the particular states of mind of the aider and abettor and the

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10 However, the act of lying in wait does not *alone* establish a killing as first degree murder. (*People v. Laws*, *supra*, 12 Cal.App.4th at p. 793.) Rather, to establish murder the jury must find that the killing was committed with express or implied malice; the lying-in-wait conduct is then used to elevate the murder to first degree murder. (*Id.* at p. 794.)

perpetrator and the availability of defenses to a particular crime. (*Id.* at pp. 1114, 1118-1120; *People v. Nero* (2010) 181 Cal.App.4th 504, 507, 513-517 (*Nero*); *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164 (*Samaniego*).) In the context of a target offense, aider and abettor liability is premised on the combined acts of all the participants, and "on the aider and abettor's *own mens rea*." (*People v. McCoy, supra,* 25 Cal.4th at p. 1120, italics added.)

II. *Claims of Errors in the Court's Instructions*

A. *Aiding and Abetting Instructions*

Defendant asserts the trial court erred when it instructed the jury on general aiding and abetting principles in the language of former CALCRIM No. 400. Using a standard CALCRIM No. 400 instruction, the jury was told: "A person may be guilty of a crime in two ways. One, he . . . may have directly committed the crime. I will call that person the perpetrator. Two, he . . . may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he . . . committed it personally or aided and abetted the perpetrator who committed it. [¶] *Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime*." (Italics added.)

Defendant asserts the instruction was erroneous due to (1) the "equally guilty" language, and (2) the last sentence referencing the natural and probable consequences doctrine.

1. *"Equally Guilty" Language*

The courts have recognized that the "equally guilty" language in CALCRIM No. 400 can be confusing or misleading, and it has now been removed from the standard instruction. (*People v. Loza* (2012) 207 Cal.App.4th 332, 348, fn. 8 (*Loza*); *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119 & fn. 5 (*Lopez*); *Samaniego, supra*, 172 Cal.App.4th at pp. 1163-1165; see also *Nero, supra*, 181 Cal.App.4th at pp. 510, 518.) As noted above, an aider and abettor may be guilty of a target offense that is lesser than the perpetrator's offense, depending on the aider and abettor's state of mind and the availability of defenses. (See *Nero, supra*, 181 Cal.App.4th at pp. 513-517; *Samaniego, supra*, 172 Cal.App.4th at pp. 1163-1164.)

The record here shows that any error in the inclusion of the "equally guilty" language in this case was harmless even if we apply the harmless-beyond-a-reasonable-doubt standard for misinstruction on the elements of an offense. (*Samaniego, supra*, 172 Cal.App.4th at p. 1165; *Lopez, supra*, 172 Cal.App.4th at pp. 1119-1120.)[11] The "equally guilty" language creates the risk that the jury might think that if it finds the

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11 Some courts, including our own, have concluded that the "equally guilty" language is generally accurate and it might be misleading only in exceptional cases, and absent a request for clarification of the instruction, the claim of error is forfeited on appeal. (*Loza, supra*, 207 Cal.App.4th at p. 349-350; *Lopez, supra*, 198 Cal.App.4th at p. 1118; *Samaniego, supra*, 172 Cal.App.4th at pp. 1163-1165.) In contrast, in *Nero*, the court concluded the language can be misleading even in unexceptional circumstances. (*Nero, supra*, 181 Cal.App.4th at p. 518.) Given our holding of no prejudice, we need not address the Attorney General's forfeiture argument, nor need we discuss defendant's alternative contention that his counsel provided ineffective representation for not requesting omission of the "equally guilty" language.

defendant in some way aided the perpetrator with the criminal conduct, it necessarily must find the defendant guilty of the same offense as the perpetrator without determining the aider and abettor's particular state of mind. (See *Loza*, *supra*, 207 Cal.App.4th at p. 356; *Nero*, *supra*, 181 Cal.App.4th at p. 518; *Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) To support that the "equally guilty" language had this effect here, defendant contends there was no instruction telling the jury that he "needed to specifically intend to aid Medina in killing [the victim] with malice aforethought."[12] The argument is unsupported. The instructions (as well as the closing arguments) informed the jury that to convict defendant of first degree murder, he had to know about and intend to assist Medina's murderous and lying-in-wait purposes.

In addition to the general aiding and abetting instruction containing the "equally guilty" language (CALCRIM No. 400), the jury was provided with a more specific instruction (CALCRIM No. 401) that explained in detail the mental state necessary to impose culpability on the basis of aiding and abetting rather than direct perpetration of a crime. The detailed aiding and abetting instruction stated that for defendant to be culpable as an aider and abettor, the prosecution had to prove that the "defendant knew that the perpetrator intended to commit the crime"; "the defendant intended to aid and

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12 In his opening brief on appeal, defendant argued that the jury was never instructed that to convict him of first degree murder, it must find that he intended to kill. The contention is unavailing because intent to kill (express malice) is not necessary to support a finding of first degree murder based on lying in wait; rather conscious disregard for life (implied malice) suffices. (See discussion, *ante*.) Defendant does not repeat this argument in his reply brief.

abet the perpetrator in committing the crime"; and the "defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." This detailed aiding and abetting instruction also elaborated that "[s]omeone aids and abets a crime if he . . . knows of the perpetrator's unlawful purpose and he . . . specifically intends to, and does in fact, aid . . . the perpetrator's commission of the crime." (CALCRIM No. 401.)

The jury was further provided with instructions defining the elements of the alleged target offense of first degree murder by lying in wait, which stated that the required state of mind for murder was intent to kill or conscious disregard for life, and for lying in wait was intent to make a surprise attack. (See CALCRIM Nos. 520, 521.)

We presume that jurors are able to understand and correlate the instructions. (*Lopez, supra,* 198 Cal.App.4th at p. 1119.) Reading the instructions as a whole, the jury knew that to find defendant guilty of murder and to find the murder was committed by lying in wait, it had to examine defendant's particular mental state and conclude that defendant knew about and shared Medina's intent to commit a surprise-attack murder.

Additionally, consistent with the instructions, the prosecutor stated in closing arguments that to find defendant guilty, the prosecution had to prove that Medina committed lying-in-wait murder; that defendant knew that Medina intended to commit the murder; and that defendant intended to, and did, aid Medina in committing the murder. The prosecutor reviewed each of the elements and cited facts showing they were established, including the elements pertaining to defendant's own mental state; i.e., defendant's knowledge of Medina's intent to commit murder, and defendant's intent to assist Medina with the murder. In the same fashion, defense counsel argued to the jury

that defendant was not guilty of murder because he did not know about or intend to assist in Medina's plan to kill French; rather, defendant's only plan and intent was to get the Navigator keys from French.

Considering the instructions in their entirety and the closing arguments, reasonable jurors would understand that the general instruction stating that a person "is equally guilty of the crime whether he . . . committed it personally or aided and abetted the perpetrator who committed it" merely meant that an aider and abettor cannot escape culpability just because he was not the direct perpetrator. There is nothing in the "equally guilty" language that suggested the jury should impose culpability on the defendant without applying the detailed aiding and abetting instructions requiring an evaluation of the defendant's particular mental state. Further, the clear focus of the closing arguments by both the prosecutor and defense counsel was whether defendant knew that Medina went to the victim's room with the intent to kill her. On this record, there is no reasonable possibility the jury would have used the "equally guilty" language to find defendant guilty of murder by lying in wait solely because he assisted Medina, without also finding that he met the aider and abettor requirements of a knowing and shared intent to commit this offense.

This case is not in the same posture as *Nero, supra*, 181 Cal.App.4th 504 and *Loza, supra*, 207 Cal.App.4th 332, in which the courts found reversible error under circumstances where during deliberations the jury *asked questions reflecting confusion* about whether an aider and abettor could have a less culpable state of mind, and the trial courts failed to clarify the matter. (*Nero, supra*, at pp. 507, 510-520 [jurors asked if aider

and abettor could be less culpable; court re-read instruction containing "equally guilty" language]; *Loza, supra,* at pp. 349, 352, 355-357 [jurors asked if they should consider the aider and abettor's state of mind; court referred jury back to the instructions].) Here, the instructions and closing arguments directed the jury to examine defendant's own particular mental state, and the jury did not ask any questions suggesting it did not fully understand this requirement.

Defendant points out that the jury submitted a note requesting information about the "definition of both charges at hand (i.e.: 1st and 2nd degree murder)," and, in response, the court referred it to the murder and aiding and abetting instructions already provided. This request for reinstruction on the elements of murder and the degree of the murder does not suggest any confusion about the *aiding and abetting instructions* that required the jury to evaluate defendant's particular state of mind.

To support his claim of prejudice arising from the "equally guilty" language, defendant argues that in closing arguments the prosecutor used this language to tell the jury that it could impute Medina's mental state to him. He cites the prosecutor's closing argument stating: "And as an aider and abettor, this defendant is equally guilty of murder, whether he personally committed the murder or he aided and abetted, which means [he] assisted in getting that murder done." This argument merely set forth the general principle that if defendant was an aider and abettor of murder, he was equally guilty of murder even if he was not the direct perpetrator. The argument did not suggest that the jurors could simply impute Medina's mental state to defendant if he helped Medina in any fashion, or that the jurors should ignore the instructions defining aider and

abettor status which required the jurors to evaluate defendant's own mental state when deciding culpability. To the contrary, the prosecutor's reference to the "equally guilty" concept was immediately followed by the prosecutor's recitation of the aiding and abetting requirements that the defendant know about and share the perpetrator's intent to commit the crime.

Defendant also cites a statement made by the prosecutor during closing argument which referred to defendant's claim to the police that he thought Medina was merely going to assault the victim. The prosecutor argued:

> "The defendant knew Benjamin Medina intended to commit the crime of murder. That's the second element under aiding and abetting that I must prove to you. . . . [Y]ou have the information from the defendant himself. And he told you, Medina talked to me about killing [French]. . . . [¶] Later, in his last interview, when he finally says that there's a plan, he now downgrades and says, Well, I didn't think he was going to kill her. I think maybe he was just going to beat her up a little bit. It doesn't matter. [¶] . . . [¶] . . . . He knew going in that [French] was going to be killed. *He knew that she was going to get a beating. . . . Lying in wait doesn't require an intent to kill. So you can get to lying in wait through a beating*." (Italics added.)

Based on this closing argument and the "equally guilty" language in the instruction, defendant argues the jury might have thought he "was equally guilty of murder even if he only had the general intent to aid and abet a battery."

We are satisfied that the "equally guilty" language, combined with the prosecutor's statement that lying in wait could be established by knowledge of "a beating," did not cause the jury to think that defendant's intent to assist a minor battery would suffice to establish his guilt of murder by lying in wait. The jury knew from the instructions and the closing arguments that defendant had to know about, and want to help with, the

perpetrator's commission of *murder*, and it was instructed that murder requires intent to kill or the intentional commission of an act that is naturally dangerous to life and conscious disregard for life. Based on these instructions and arguments, reasonable jurors would understand that the beating referred to by the prosecutor could support culpability only if the defendant intended that it rise to the level of a life-threatening act committed with conscious disregard for life, and that if defendant merely intended to help Medina commit a minor battery creating no risk of death this would not suffice.

Defendant further notes that the detailed aider and abettor instructions set forth in CALCRIM No. 401 did not specify which crime he had to aid and abet; i.e., the instruction did not state he had to aid and abet lying-in-wait murder, but merely referred to aiding and abetting "a crime." (Compare *Lopez, supra*, 198 Cal.App.4th at pp. 1119-1120 [aider and abettor instructions referred to charged offense of attempted robbery].) This does not show the jury might have interpreted the "equally guilty" language to mean defendant could be found culpable of aiding and abetting murder irrespective of what crime he intended Medina to commit. As set forth above, the jury knew from the instructions and closing arguments that the charged offense was first degree murder, and knew that the issues under consideration were whether defendant knew about and shared Medina's murderous and lying-in-wait purposes. There is no reasonable possibility the jury was misled by the failure to specify the charged murder offense in the detailed aiding and abetting instruction.

In short, the instructions, reinforced by the closing arguments, consistently communicated to the jury that to find defendant culpable, defendant had to know about

and intend to facilitate Medina's murderous activity. Given this clear directive requiring the jurors to examine and determine defendant's own mental state, there is no reasonable possibility they would have used the "equally guilty" language to simply impute Medina's mental state to defendant once they found defendant participated in the criminal activity.

2. *Reference to the Natural and Probable Consequences Rule*

The Attorney General concedes, and we agree, that there was no basis to include the last sentence in CALCRIM No. 400 referring to possible culpability based on other crimes that occur while aiding and abetting the target crime. The prosecution's theory of the case was that defendant was liable for the murder because murder was his intended, target offense, and not because the murder was an unintended offense that was a natural and probable consequence of some other offense intended by defendant.

However, there was no prejudice. Apart from the brief reference in CALCRIM No. 400, the jury was provided no further instructions pertaining to the natural and probable consequences doctrine. We presume the jury disregarded an instruction that had no relevancy to the issues it was told to decide. (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278.)

To support his contention of prejudice, defendant asserts that the jury was presented with evidence of offenses apart from murder such as drug use, car theft, destruction of evidence, burglary, battery, assault with a deadly weapon, burning of the victim's body, and threats by Medina. He argues the statement about the natural and probable consequences doctrine directed the jury to find him "guilty of murder if he aided and abetted in other crimes," and/or that the jury may have used the statement to convict

him based on "unspecified 'nefarious conduct.' " We are not persuaded. The instructions informed the jury that defendant was charged with murder on an aiding and abetting theory, and delineated the requirements to convict him as an aider and abettor of murder. There is no reasonable possibility the jury used the brief, superfluous reference to the natural and probable consequences doctrine to find him guilty of murder without finding that he had the required mental state for an aider and abettor of the target offense of murder.

Defendant also argues the prosecutor referenced the natural and probable consequences doctrine during closing argument when she stated that lying in wait does not require an intent to kill but can be shown by a "beating." The contention of prejudicial error based on this statement is unavailing. The prosecutor did not suggest to the jury that defendant was guilty of murder if he aided a beating because death is a foreseeable consequence of a beating. Instead, the prosecutor merely stated that a beating can support lying-in-wait murder without a showing of intent to kill.

The inclusion of the irrelevant reference to the natural and probable consequences rule was harmless.[13]

B. *Modification of Murder and Lying-in-Wait Instructions*

Over defense objection, the trial court slightly modified the standard instructions on murder and lying in wait set forth in CALCRIM Nos. 520 and 521 to accommodate

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13 Given our finding of no prejudice from the irrelevant reference to the natural and probable consequences doctrine, we need not discuss defendant's ineffective representation claim concerning this issue.

the aiding and abetting theory of defendant's culpability. Defendant contends the modifications misdirected the jury.

The court's modifications changed language stating that the prosecution must prove *the defendant committed* conduct and had a certain state of mind, to language stating that the prosecution must prove the defendant *aided and abetted* conduct that was committed by *a person* with a certain state of mind.

Defendant asserts the modifications were improper, apparently because he views them as allowing the jury to find him guilty based on Medina's state of mind and/or conduct rather than his own. As we described above, the jury was properly instructed in a manner that told them that defendant was guilty of the murder committed by Medina only if defendant knew about, wanted to assist, and did assist Medina's murderous conduct. Defendant has not shown instructional error due to the court's modification of the murder and lying-in-wait instructions to conform with the aiding and abetting theory.

III. *Sufficiency of the Evidence To Show Aiding and Abetting of Murder*

Defendant asserts there is insufficient evidence to support the jury's conclusion that he aided and abetted the murder committed by Medina. He argues the record does not support findings that he knew about, shared, and assisted Medina in his murderous purpose. He asserts that at most, the record supports that he was guilty of being an accessory after the fact.

When reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt. (*People v. Cravens, supra*, 53 Cal.4th at p. 507.) Although the jury must acquit if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of guilt beyond a reasonable doubt. (*Id*. at pp. 507-508.) If the circumstances reasonably justify the jury's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*Id.* at p. 508.)

Viewing the evidence in the light most favorable to the jury's verdict, the record shows that Medina, a gang member, decided that French had committed an act of disrespect, and Medina told defendant that he wanted to kill her. Thereafter, defendant and Medina formulated a plan for defendant to go to French's room and gain access based on defendant's friendship, and then for defendant to let Medina into the room. Defendant went to French's room, and then "chirped" Medina on a two-way radio to join him. Medina then went to French's room and, with no interference by defendant, killed her by strangulation. Defendant wrapped her body in trash bags and thereafter assisted Medina in disposing of (and later burning) her body in an orange grove. Defendant was observed to have scratches on his face a short time after the murder. Several hours after the murder, defendant was heard laughing and playing dice with Medina, and a few days after burning the victim's body defendant accompanied Medina to a casino. While at the orange grove, defendant threatened one of his friends who witnessed some of the events associated with the murder, telling her not to say anything.

From this evidence, the jury could reasonably conclude that, contrary to defendant's statement to the police, defendant believed that Medina's threat to kill the victim was serious. The jury could consider that Medina was a gang member known to carry a gun, and deduce that French's conduct of taking a car (which contained guns) in direct defiance of an instruction not to do so was viewed as a serious act of disrespect in the gang culture. Further, based on defendant's close association with Medina before and after the murder, the jury could infer that defendant likely knew about Medina's status as a gun-carrying gang member and knew that Medina would respond to disrespect with life-threatening discipline.[14]

Further, the jury could deduce that defendant intended to, and did, assist Medina in committing the murder by facilitating Medina's entry into the victim's room. The jury was entitled to credit Allen's testimony that the plan was for defendant to enter French's room based on his friendship with French, and then to let Medina into the room. The jury could find that the scratches on defendant's face were consistent with the victim using her fingernails in defensive fashion, which supported that defendant participated in the attack. The jury could also conclude that defendant's conduct after the murder—including actively assisting with the disposal of the body, continuing to socialize with the perpetrator after the murder, and some days later threatening one of the witnesses not to

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[14] Flores and Allen testified that they knew Medina carried a gun, and Flores testified she knew he was a gang member. Detective Mike Medici testified that Medina had numerous tattoos associated with his gang.

say anything—was inconsistent with someone who had no knowledge of or intent to help with the murder.

To support his challenge to the sufficiency of the evidence, defendant cites various evidentiary items that could support findings that defendant only went to the victim's room to facilitate Medina's retrieval of the Navigator keys; the victim's friends (including defendant) did not take Medina's threats directed at the victim seriously; defendant had no motive to help Medina murder the victim and was in shock as the result of Medina's actions; defendant did not personally assault the victim; defendant's assistance with the disposal of the body arose from Medina's threats to hurt him and his family; and defendant's conduct of contacting the police on his own showed his lack of criminal intent. Although the jury was entitled to reach these conclusions from the evidence, it was not required to do so. As set forth above, there was substantial evidence to support findings that defendant knew about, shared in, and facilitated Medina's murderous, lying-in-wait purposes.

IV. *Failure To Provide Instructions*

A. *Voluntary Intoxication*

Defense counsel requested that the jury be instructed on voluntary intoxication to negate specific intent based on the evidence that defendant was using drugs. The trial court ruled the instruction was not supported by the record because there was no evidence regarding the effect of the drugs on defendant. Defendant asserts the trial court erred in denying his request for the instruction. Alternatively, he argues his counsel provided ineffective representation by failing to introduce evidence on intoxication sufficient to

support the instruction, including eyewitness testimony and expert testimony on the effects of his "all night drug binge."

Evidence of voluntary intoxication may be used to show the defendant did not have the specific mental state required for commission of the crime. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1129-1131; *People v. Horton* (1995) 11 Cal.4th 1068, 1119.) A defendant is entitled to an instruction on voluntary intoxication if there is evidence from which a reasonable jury could conclude that the defendant's mental state was so impaired that he did not entertain the required criminal intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677-678; *People v. Marshall* (1996) 13 Cal.4th 799, 848.) A mere showing of drug or alcohol consumption and some impairment, without any showing of effect on the defendant's state of mind, is not enough to require an intoxication instruction. (*Marshall, supra,* at p. 848.)

Flores testified that she and her friends, including defendant, were using methamphetamine during their stay at the Comfort Inn. She stated that on the day of the murder she used the drug "a lot" (about six or seven times); she felt its effects strongly; and it made her feel alert until the effects wore off and she would "crash." Sometimes she had feelings of paranoia and she would hear things that were not there. However, when she was at the Comfort Inn at the time of the murder she was able to function and observe what occurred and she was not hearing things. Similarly, Allen testified that he used a lot of methamphetamine the night of the murder, but it was not to the point that he could not function and it only made him stay awake. The investigating detective

(Detective Medici) testified that defendant told him that at the time of the murder he used "quite a bit" of methamphetamine.

This testimony concerning defendant's use of methamphetamine with his friends on the night of the murder does not suggest that defendant was so impaired by the drug that it had an effect on his formulation of intent. To the contrary, Flores's and Allen's testimony shows that the drug made them alert, not that it caused them to be less aware of what they were doing. The trial court did not err in rejecting the request for instruction on voluntary intoxication.

We also reject defendant's assertion that his counsel's representation was deficient because he did not present an adequate evidentiary foundation for the instruction. To prevail on a claim of ineffective representation, the defendant must establish that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that but for counsel's errors the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) At a postverdict hearing on defendant's motion for new trial, defendant's trial counsel testified that defendant told him that his drug use made him alert, and defendant never indicated that it affected his understanding of the events on the night of the murder. Likewise, defendant's companions testified at trial that their drug use made them more alert and did not affect their ability to function or observe. Based on the information provided by defendant and the eyewitnesses, defense counsel reasonably assessed that defendant's formulation of intent was not affected by his drug usage; there was no eyewitness testimony that would support a contrary conclusion; and expert testimony on the effects of intoxication would serve no purpose.

B. *Involuntary Manslaughter*

Defendant contends his counsel provided ineffective representation by failing to request that the jury be instructed on the lesser included offense of involuntary manslaughter. He asserts involuntary manslaughter instructions were supported by the evidence showing that he merely intended to aid a battery, or that he engaged in criminal negligence by failing to realize that summoning Medina to the victim's room could facilitate the victim's death.

Involuntary manslaughter is a lesser included offense of murder that is committed when the defendant acts with criminal negligence but without intent to kill or conscious disregard for life. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006.) For a killing to constitute involuntary manslaughter, the act committed by the defendant must be a lawful act, a misdemeanor, or a noninherently dangerous felony. (*Ibid*.) For example, if the defendant committed a misdemeanor battery or assault that resulted in a killing, the offense may be involuntary manslaughter. (See *People v. Benavides* (2005) 35 Cal.4th 69, 102-103; *People v. Parras* (2007) 152 Cal.App.4th 219, 227-228; *People v. Bohana* (2000) 84 Cal.App.4th 360, 372; *People v. McManis* (1954) 122 Cal.App.2d 891, 898.) Similarly, if the defendant caused a death by committing a lawful act without due caution and circumspection, the defendant may be guilty of involuntary manslaughter. (*People v. Butler, supra*, 187 Cal.App.4th at p. 1007.) These same principles apply to an aider and abettor even if the perpetrator entertained a more culpable state of mind. (See *People v. Butler* (2009) 46 Cal.4th 847, 869; *People v. McCoy, supra*, 25 Cal.4th at p. 1119.) A jury should be instructed on a lesser included offense when, viewing the record in the

manner most favorable to the defendant, there is evidence from which the jury could conclude that the lesser, but not the greater, offense was committed. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584-585.)

At the hearing on defendant's new trial motion, defense counsel testified that he did not request involuntary manslaughter instructions because defendant claimed he was never aware that Medina was going to do something to the victim and he never wanted Medina to do something to her. At the new trial motion hearing, the trial court also set forth its recollection of what occurred at trial with respect to involuntary manslaughter instructions.[15] The court stated that it asked defense counsel about instructing on involuntary manslaughter; counsel stated that for tactical reasons he did not want the instruction because it would suggest that defendant knew Medina was going to do something to the victim; and the court viewed this as a typical "all or none" defense strategy that did not give the jury "a way out to go with a secondary crime."[16]

When examining a claim of ineffective assistance of counsel, reviewing courts defer to counsel's reasonable tactical decisions, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*People v. Weaver, supra*, 26 Cal.4th at p. 925.) We accord great deference to counsel's

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15 The discussion about these instructions during trial apparently occurred off the record.

16 Defense counsel and the trial court also stated at the new trial motion hearing that they did not think the facts supported instruction on involuntary manslaughter. Based on our holding below that defense counsel made a reasonable tactical decision to decline involuntary manslaughter instructions, we need not discuss whether the evidence supported the instruction.

tactical decisions, and do not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. (*Id*. at pp. 925-926.) Even debatable trial tactics do not constitute a deprivation of effective assistance of counsel. (*Id*. at p. 928.) It has long been recognized that defense counsel may legitimately elect to forego instruction on a lesser included offense in the hopes of achieving an acquittal or deadlocked jury, rather than risk a lesser offense conviction as a compromise verdict. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1235; *People v. Lara* (1994) 30 Cal.App.4th 658, 674; see also *People v. Barton* (1995) 12 Cal.4th 186, 204.)[17]

Assuming arguendo that an involuntary manslaughter instruction was supported by the evidence, defendant has not shown that his counsel's decision to have the jury only consider the alleged first degree murder charge was an unreasonable tactical decision. In reaching this conclusion, defense counsel could reasonably rely on the evidence showing that none of defendant's friends thought Medina was serious about killing the victim, and defendant's friends consistently stated the plan was merely for defendant and/or Medina to retrieve the Navigator keys. Further, Medina admitted he was the one who killed the victim; there was no independent eyewitness who saw defendant actually participate in

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17 Notwithstanding that defense counsel may reasonably elect an all-or-nothing strategy, the California Supreme Court has fashioned the rule that trial courts must still sua sponte instruct on lesser included offenses supported by the evidence even over defense objection. (*People v. Barton, supra*, 12 Cal.4th at p. 198; *People v. Duncan* (1991) 53 Cal.3d 955, 969.) However, when the trial court's failure to instruct on a lesser included offense was in response to a tactical decision by defense counsel to forego the instruction, the invited error doctrine precludes review of this issue on appeal. (*Barton, supra*, at p. 198; *Duncan, supra*, at p. 969.) Defendant does not argue for reversal based on the trial court's sua sponte duty to instruct on lesser included offenses.

the assault; defendant was friends with the victim; and Medina (not defendant) was the person with a likely tendency for violence due to his gang membership and possession of a gun. Further, defendant's postmurder assistance with the disposal of the victim's body could be explained by the evidence that Medina threatened to kill defendant and his family if defendant did not cooperate. Based on this evidence, defense counsel could reasonably conclude the jury might credit defendant's claim that he did not know about or share Medina's intent to hurt or kill the victim, and it was worth "going for broke" and only giving the jury the option of a guilty verdict on murder or an acquittal.

The record does not show ineffective representation based on defense counsel's decision not to request instruction on involuntary manslaughter.[18]

C. *Duress*

Defendant contends his counsel provided ineffective representation by failing to request instruction on the defense of duress. He recognizes that the California Supreme Court has held that duress is not a defense to murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 770, 784 [fear does not justify killing of innocent person; defendant " 'ought rather to die himself than to escape by the murder of an innocent' "].) Accordingly, this contention fails.

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18 Although we need not reach the issue of prejudice, we note that the fact the jury found defendant guilty of first degree, rather than second degree, murder strongly suggests it would not have been persuaded to convict defendant of a lesser offense even if it had been instructed on involuntary manslaughter. (See *People v. Rogers* (2006) 39 Cal.4th 826, 884; *People v. Manriquez, supra*, 37 Cal.4th at p. 588.)

D. *Accessory After the Fact*

Defendant asserts his counsel was incompetent for failing to request instruction on the lesser related offense of accessory to murder based on his conduct after the murder. At the hearing on defendant's new trial motion, defense counsel testified that in an off-the-record discussion during trial, he did ask for an instruction on accessory after the fact because the defense agreed that defendant had engaged in this conduct. However, defense counsel recollected that the prosecutor objected to providing the instruction.

A court may not instruct on a lesser related offense unless the prosecution agrees. (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.) Based on defense counsel's testimony that he did request the accessory instruction and that the prosecutor objected to it, defendant has not carried his burden to show ineffective representation in this regard.

V. *Other Claims of Defense Counsel's Deficiencies*

A. *Response to Evidence of Scratches on Defendant's Face*

Defendant contends his counsel did not properly prepare for, or respond to, the evidence showing that Herrera saw scratches on defendant's face.

On cross-examination after Herrera testified that she saw scratches on defendant's face, defense counsel questioned her about the accuracy of her observation. For example, defense counsel elicited testimony that her observation of the scratches was made at night, during a 10-second view of defendant, and at a distance of about 12 feet. Defense counsel also elicited testimony from Herrera and Detective Medici to show inconsistencies in Herrera's description of the scratches; for example, she testified they were under his eyes, whereas she told the police they were on his cheeks. Defense

counsel asked Herrera if she had told the police about the scratches; Herrera answered yes, but when shown a police report, she acknowledged there was no mention of scratches in the report. On redirect examination, the prosecutor showed Herrera a second police report that did mention the scratches. In closing arguments, defense counsel told the jury that Herrera did not mention the scratches in her first police interview, but only reported them in her second interview. Defense counsel also elicited testimony that at a previous trial Herrera had claimed she had been "all jacked up on drugs" and she either denied or did not remember many of the statements she made to the police about Medina and defendant's presence at her home on the night of the murder.

The record shows that defense counsel sought to impeach Herrera's testimony about the scratches by eliciting testimony showing there were impediments to her accurate observation of defendant's face; her description of the location of the scratches had varied; she failed to tell the police about the scratches when first interviewed; and her overall credibility was questionable due to her admitted drug usage and previous retraction under oath of many of her statements. These measures undertaken by defense counsel show that he presented a prepared and appropriate response to the prosecution's evidence concerning the scratches.

To support his contention of ineffective representation, defendant cites a portion in the record reflecting that after the prosecutor elicited testimony from Herrera that a second police report mentioned the scratches, defense counsel was having trouble finding this second police report which he had previously received from the prosecutor. To solve this problem, the court directed the prosecutor to make another copy of the report and

provide it to defense counsel. This incident does not establish that defense counsel was ill-prepared or deficient in his duties. As set forth above, the record supports that defendant counsel engaged in a reasonable refutation of the evidence concerning the scratches.

Defendant also asserts his counsel was ineffective because he did not ask Flores if she saw scratches on defendant's face that night after the murder, and did not ask the prosecution's forensic witness if he took scrapings from under the victim's fingernails (apparently to extract DNA evidence). Defendant has not proffered any information showing these matters might have provided evidence favorable to him. Absent such a showing, his claim of incompetency on this ground is speculative and accordingly fails. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.)

B. *Failure To Proffer Unavailable Witness's Preliminary Hearing Testimony*

Defendant asserts his counsel's representation was ineffective because he failed to seek admission of the preliminary hearing testimony of eyewitness Erika Arreola.

At trial, the court ruled Arreola was an unavailable witness because she had properly exercised her privilege against self-incrimination. Thereafter, defense counsel moved to admit into evidence portions of Arreola's previous testimony, apparently referring to her testimony at Medina's trial. Defense counsel cited Arreola's testimony that she heard Medina say that French was disrespectful and heard him confess to killing the victim; that she was afraid of Medina the next time she saw him; and Medina was constantly outside of her home watching her after the murder. The trial court denied defense counsel's request to admit the previous testimony, finding it did not fall within

the hearsay exception set forth in Evidence Code section 1291 (pertaining to former testimony), and further it should be excluded under Evidence Code section 352 because it was cumulative to matters that were addressed by prosecution witnesses.

Defense counsel also moved to call Detective Medici to the stand to testify about statements made by Arreola when she was interviewed by the police. Counsel stated that Arreola told Medici that a few days before the murder she saw Medina assault French in a manner that " 'defied the laws of gravity' " and caused French to fall to the ground.[19] Defense counsel argued these statements were admissible to respond to the prosecution's evidence that French had hemorrhages in her back, and to rebut the anticipated prosecution theory that defendant participated in the assault on French by attacking her from behind. The trial court concluded there was no hearsay exception permitting admission of the statement, and moreover the defense did not need the evidence because a prosecutorial claim that defendant attacked the victim from behind appeared to be speculative and was subject to objection by the defense.

On appeal, defendant argues his counsel was ineffective because he only requested admission of Arreola's testimony at Medina's trial, which was ruled inadmissible under Evidence Code section 1291, whereas he did not request admission of Arreola's preliminary hearing testimony, which would have been admissible under Evidence Code section 1291. Regardless of the Evidence Code section 1291 issue, defendant's claim of

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19 The prosecutor told the court these statements were contained in Arreola's testimony at Medina's trial, whereas defense counsel stated this was incorrect and the statements were in the police reports.

error in this regard fails because the court also excluded the proffered former testimony because it was *cumulative* to matters already presented by other witnesses. Defendant has presented no argument showing that this conclusion does not apply equally to Arreola's preliminary hearing testimony, or that the trial court abused its discretion in excluding the evidence on cumulative grounds. Defendant argues the preliminary hearing testimony was "a fertile ground to get in appellant's methamphetamine binge" and "the lack of any plan other than to get the Navigator back." These were matters already addressed in the testimony of Flores and Allen. Given our conclusion based on the court's cumulative ruling, we need not discuss the merits of the court's ruling, or defendant's argument, concerning Evidence Code section 1291.

Regarding the proffered evidence concerning Medina's previous assault on the victim, defendant cites a portion of Arreola's preliminary hearing testimony where she states that she learned about this incident from Flores but did not herself witness it. Defendant states that his counsel never asked Flores about this prior assault, which would have explained how the victim suffered hemorrhaging to her head and back. Defendant's complaint about the failure to question Flores on this point does not show error from the failure to move to admit Arreola's preliminary hearing testimony.

To the extent defendant's contention of deficient representation is premised on the failure to question Flores about the prior assault committed by Medina, he has not carried his burden to establish incompetency of counsel. First, there is no showing the court would have admitted (or been required to admit) the evidence given its ruling that any argument by the prosecution that defendant attacked the victim from behind was

speculative and subject to objection. Second, in closing arguments the prosecutor did not argue that defendant was guilty because he physically attacked the victim, but rather asserted defendant was guilty because he planned the victim's murder with Medina and assisted in carrying out the plan by serving as Medina's "conduit into [the victim's] room." There is no reasonable probability the jury would have reached a result more favorable to defendant had it heard evidence about Medina's previous attack on the victim.

VI. *Prosecutorial Misconduct*

Defendant argues the prosecutor committed misconduct when she stated during closing arguments that defendant knew that Medina was a violent, "shot-caller" gang member called "the Devil." He asserts there was no evidence to support that he knew this about Medina.

Defense counsel objected to this argument on the ground that it misstated the evidence. The trial court overruled the objection, but admonished the jury that it must decide what the evidence was.

A prosecutor is given wide latitude to vigorously argue the case as long as the argument is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) However, the prosecutor may not deliberately or mistakenly misstate the evidence. (*Id.* at p. 823.)

Given the wide latitude afforded to the prosecutor to draw inferences from the evidence, the prosecutor did not err in arguing that defendant knew Medina was a violent,

shot-caller gang member. Flores testified she knew Medina was a gang member; Detective Medici testified Medina had numerous tattoos associated with his gang; and both Flores and Allen testified they knew Medina carried a gun. Defendant told the police that Medina wanted to "blast" the victim or "tune her up" because of her disrespect. It is reasonable to infer that a gang member who carries a gun may have violent tendencies, and that a gang member who issues threats to discipline a person for disrespect is a leader within the gang. Further, based on defendant's close association with Medina before, during, and after the murder, it is reasonable to infer that defendant was aware of Medina's gun possession and membership and status in a gang.

The prosecutor's reference to Medina being called "the Devil" was derived from the testimony of Medina's friend (James Mercado) who went to the orange groves to help get Medina and defendant's vehicle out of the mud. Mercado testified that Medina was known as Rebel or the Devil. Flores and Herrera testified that they had not heard that Medina was called the Devil. Nevertheless, the prosecutor could infer that defendant, like Mercado, knew about the Devil nickname. The evidence showing a high level of cooperation and interaction between Medina and defendant before and after the murder supported that they were well-acquainted with each other. There was no error in the prosecutor's closing argument.

VII. *Juror Misconduct*

A. *Denial of New Trial Motion Based on Juror's Internet Research*

Defendant argues the trial court erred in denying his new trial motion due to an incident of misconduct when a juror researched the legal meaning of a term on the Internet.

Background

During jury deliberations, the jury foreperson informed the court that the previous evening a juror (Juror No. 1) had conducted Internet research to look up how California law defined the term "threats." When Juror No. 1 communicated this activity to the other jurors, a juror (Juror No. 10) became "quite upset," whereas all the other jurors viewed it as "no big deal." The foreperson elaborated that all the jurors had come to a conclusion except for Juror No. 1, and Juror No. 1 tried to persuade the other jurors by making a presentation to them about how he felt. During this presentation, Juror No. 1, who had been quite upset at the end of deliberations the previous day, brought up the matter of his Internet research. As soon as he mentioned the Internet research, the foreperson "cut him off" and said they needed to contact the bailiff about this.

When questioned by the court, Juror No. 1 stated he had looked "up a definition if someone threatened myself and what would that mean in California," and he told the other jurors about this to help him articulate his views to them. Juror No. 1 told the court that he thought he was only prohibited from researching matters directly related to the particulars of the case; he engaged in the Internet research out of ignorance and without thinking; and it would not affect his ability to be a juror.

Juror No. 10 was also questioned. He stated that the jurors "were battling this thing out," and Juror No. 1 said he did not understand some of the things they were talking about, so that night at home he did some research on his computer. Juror No. 1 returned the next day and said Juror No. 10 needed to know this information, and Juror No. 1 also spoke about it to the other jurors. Juror No. 10 told him that he was not supposed to do that, and Juror No. 1 responded that he needed that information. When queried by the court, Juror No. 10 stated that he did not think the incident affected the jury's ability to do its job. Juror No. 10 explained the incident happened quickly; the other jurors were surprised and told Juror No. 1 he could not do this; and they did not get any further than saying he did something he was not supposed to do.

The trial court individually questioned each of the remaining jurors about the incident. The jurors consistently described the incident, and stated it would not affect their ability to continue deliberating or to deliberate with Juror No. 1. One juror commented that the jury had not made a decision, and the jurors were continuing to discuss the evidence and law as presented to them by the court.

The prosecutor requested that Juror No. 1 be replaced due to the potential for prejudice from the misconduct, whereas defense counsel argued the presumption of prejudice had been rebutted by the jurors' responses to the court's questioning. Defense counsel noted that Juror No. 1 acknowledged his mistake, and the jurors stated they were not influenced by the incident and could continue to deliberate with Juror No. 1. The court declined to replace Juror No. 1, concluding his misconduct was not a "significant intrusion into the fact-finding process because he just looked up a term," and all the other

jurors said the incident did not make any difference to them and they could continue deliberating and continue working with Juror No. 1.

After the jury's verdict, the trial court denied defendant's request for a new trial based on the juror misconduct.

Analysis

A defendant has a constitutional right to a trial by an impartial jury. (*In re Hamilton* (1999) 20 Cal.4th 273, 293.) An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it. (*Id*. at p. 294.) Misconduct by a juror raises a rebuttable presumption of prejudice. (*Id*. at p. 295.) However, the presumption is rebutted, and the verdict will not be disturbed, if the record shows there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment. (*Id*. at p. 296; *People v. Clair* (1992) 2 Cal.4th 629, 668.) On appeal from a ruling denying a new trial motion based on juror misconduct, we defer to the trial court's factual and credibility findings if supported by substantial evidence, and exercise our independent judgment on the issue of whether the presumption of prejudice has been rebutted. (*People v. Danks* (2004) 32 Cal.4th 269, 303-304.)

To the extent defendant is asserting a new trial should have been granted because the court failed to remove Juror No. 1, the record shows no error. The trial judge (who was the same at both the juror misconduct and new trial motion hearings) was entitled to credit the assurances from Juror No. 1 and the other jurors that they all now recognized that the Internet research was improper and that it would not affect their ability to

properly deliberate with each other. Further, the record suggests that Juror No. 1's research into the legal definition of threats was either benign, or of no detriment to the defense to the extent Juror No. 1 was a hold-out juror arguing for acquittal. The record shows the presumption of prejudice was rebutted. Given our holding, we need not discuss the Attorney General's contention that the issue of removal of Juror No. 1 was forfeited due to defense counsel's request that the court not remove the juror.

In support of his challenge to the denial of the new trial motion, defendant argues that the record shows that Juror No. 1 "was a holdout juror who changed his vote to guilty very soon after being called to the mat for his misconduct"; Juror No. 10 was upset with Juror No. 1; and the court did not advise Juror No. 1 that "despite his out of court investigative foray . . . he was still entitled to his views." Defendant asserts that he was prejudiced by the misconduct because "Juror No. 1 was stripped of his impartiality, which lessened the prosecutor's burden of proof." It appears that defendant is asserting that he was prejudiced because Juror No. 1 felt pressured to vote for conviction because he got into trouble due to his improper Internet research. This contention is speculative. The record of the misconduct hearing shows that the court asked Juror No. 1 to describe his research and his communications to the other jurors; Juror No. 1 answered these questions and stated that he now understood he was not supposed to conduct this research; and the court asked him if the incident would affect his ability to deliberate. There is nothing suggesting that the court or any juror indicated to Juror No. 1 that he should change his views because of his misconduct. Further, the record shows that Juror

No. 10 was upset at Juror No. 1 because he had conducted the research, not because Juror No. 1 held a different view from the other jurors.

The trial court did not err in denying the new trial motion based on the juror misconduct.

B. *Denial of Request for Disclosure of Juror Information and for Review of Subpoenaed Records*

Defendant argues the trial court erred in denying his request for disclosure of juror contact information to investigate an alleged incident of juror misconduct, and in refusing to allow his counsel to review cell phone records related to the misconduct claim that were examined by the court in camera.

Background

After the jury's verdict, defense counsel filed a motion requesting disclosure of contact information for the jurors to assist with preparation of a new trial motion. In support, defense counsel submitted a declaration from defendant's cousin, Shannon Blanton, stating that the evening before the jury's verdict, defendant's father, Jeff Berry (Mr. Berry), told her that " 'everything was good' " because he had been texting a juror seated in the second row. In one text the juror said " 'there was not enough evidence,' " and in another text the juror said " 'still the same.' " During the trial Mr. Berry briefly showed Blanton one of the texts. Defense counsel informed the court that he had attempted to contact Mr. Berry (who had returned to his home in Arizona), but Mr. Berry had not returned his calls and apparently did not want to get involved.

At a hearing on the disclosure motion, defense counsel proffered testimony from Blanton and other family members concerning Mr. Berry's claims about the text messages, and testimony from Blanton's husband who said that after the guilty verdict Mr. Berry was "exasperated" and said he "felt betrayed" because of the text messages. In addition, the parties discussed information contained in a disk provided to the court by Mr. Berry's cell phone provider in response to a subpoena issued by defense counsel. The court stated that it had conducted an in camera review of the disk and none of the phone numbers listed in the cell phone company's data matched the jurors' phone numbers.

The court denied defense counsel's request that he be permitted to briefly review the cell phone records in the court's presence to verify that the phone company had sent all the requested information and that the court had not overlooked any relevant information. The court also denied the request for disclosure of the juror contact information. The court stated that defense counsel had not made a sufficient showing to overcome Mr. Berry's privacy interest in his phone records and the jurors' privacy interest in their contact information. The court noted that defense counsel had no information directly from Mr. Berry that the misconduct had occurred, and the cousin's unsubstantiated claims concerning the text messages was insufficient to overcome the privacy interests. Additionally, the court found there was no prejudice arising from the alleged misconduct, noting that any interference caused by Mr. Berry's communication with the juror would have operated to support a not guilty verdict.

Analysis

To support disclosure of juror identifying information, the defendant must make a prima facie showing that there is good cause for release of the information, including that the alleged misconduct is "'of such a character as is likely to have influenced the verdict improperly.'" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1320, 1322.) If the record shows that investigation of alleged juror misconduct would not reveal anything prejudicial, the trial court may deny the petition for disclosure. (See *People v. Box* (2000) 23 Cal.4th 1153, 1222-1223, disapproved on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) We review a trial court's rulings concerning disclosure of juror identifying information under the deferential abuse of discretion standard. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

Assuming arguendo that Mr. Berry communicated with the juror, the record shows there was no prejudice to defendant from the misconduct. Mr. Berry is defendant's father, and the information proffered by defense counsel shows that Mr. Berry wanted the juror to *acquit* his son. There is nothing to suggest that Mr. Berry would have had a reason to convey any information to the juror that was detrimental to defendant. Because the alleged misconduct was not likely to have prejudiced defendant, the trial court did not abuse its discretion in denying the disclosure motion. (See *People v. Barton* (1995) 37 Cal.App.4th 709, 717-719 [juror's communications with defendant's uncle caused detriment to the People, but not to the defendant].) For the same reason, the trial court did not abuse its discretion in denying defense counsel's request to personally review the cell phone records.

VIII. *Cumulative Effect of Errors*

We reject defendant's contention that the cumulative effect of errors at his trial requires reversal of the judgment. To the extent we have identified possible error, it concerned the aiding and abetting instructions and juror misconduct. For the reasons set forth above, these alleged errors were not prejudicial, and we reach the same conclusion even if we view them cumulatively rather than individually.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.